Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

BERING STRAIT SCHOOL DISTRICT,

Petitioner,

v.

UNITED STATES OF AMERICA and UNITED STATES OF AMERICA ex rel. NORTON SOUND HEALTH CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a federal statutory right of recovery excludes recovery against "any State," should that exclusion apply to an instrumentality created and funded by the Alaska Legislature for the sole purpose of providing constitutionally mandated state educational services?

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PETITION FOR WRIT OF CERTIORARI

The Bering Strait School District respectfully petitions for a Writ of Certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at *United States of America ex rel. Norton Sound Health Corp. v. Bering Strait School District*, 138 F.3d 1281 (9th Cir. 1998) (Schwarzer, J.; O'Scannlain, J., dissenting). App. A. The opinion of the district court in *United States v. Bering Strait School District*, CV-94-00247 (HRH), is not reported and is attached. App. B.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on March 12, 1998. The Court of Appeals denied a timely Petition for Rehearing on May 4, 1998. App. C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Ninth Circuit's interpretation of the term "State" in § (b) of the federal Indian Health Care Improvement Act, 25 U.S.C. § 1621e, which states:

> § 1621e. Reimbursement from certain third parties of costs of health services
>
> (a) Right of recovery
>
> Except as provided in subsection (f) of this section, the United States, an Indian tribe, or a tribal organization shall have the right to recover the reasonable expenses incurred by the Secretary, an Indian tribe, or tribal organization in providing health services, through the Service, an Indian tribe, or tribal organization, to any individual to the same extent that such individual, or any nongovernmental provider of such services, would be eligible to receive reimbursement or indemnification for such expenses if –
>
> (1) such services had been provided by a nongovernmental provider, and
>
> (2) such individual had been required to pay such expenses and did pay such expenses.
>
> (b) Recovery against State with workers' compensation laws or no-fault automobile accident insurance program
>
> Subsection (a) of this section shall provide a right of recovery against any State only if the injury, illness, or disability for which health services were provided is covered under –
>
> (1) workers' compensation laws, or

(2) a no-fault automobile accident insurance plan or program.

(c) Prohibition of State law or contract provision impediment to right of recovery

No law of any State, or of any political subdivision of a State, and no provision of any contract entered into or renewed after November 23, 1988, shall prevent or hinder the right of recovery of the United States, an Indian tribe, or a tribal organization under subsection (a) of this section.

(d) Right to damages

No action taken by the United States, an Indian tribe, or a tribal organization to enforce the right of recovery provided under subsection (a) of this section shall affect the right of any person to any damages (other than damages for the cost of health services provided by the Secretary through the Service).

(e) Intervention or separate civil action

The United States, an Indian tribe, or a tribal organization may enforce the right of recovery provided under subsection (a) of this section by –

(1) intervening or joining in any civil action or proceeding brought –

(A) by the individual for whom health services were provided by the Secretary, an Indian tribe, or a tribal organization, or

(B) by any representative or heirs of such individual, or

(2) instituting a separate civil action, after providing to such individual, or to the representative or heirs of such individual, notice of the intention of the United States, an Indian tribe, or a tribal organization to institute a separate civil action.

(f) Coverage under self-insurance plan funded by Indian tribe or tribal organization

The United States shall not have a right of recovery under this section if the injury, illness, or disability for which health services were provided is covered under a self-insurance plan funded by an Indian tribe or tribal organization.

STATEMENT OF THE CASE

I. THE INDIAN HEALTH CARE AMENDMENTS OF 1988 AND 1992.

In 1988, Congress amended the Indian Health Care Improvement Act to allow providers of Indian health services to recover the costs of providing free health care to Native Americans covered by employment or other health insurance policies.

From 1988 to 1992, the federal statute provided an exception for states and political subdivisions. "Subsection (a) of this section shall provide a right of recovery against any State, *or any political subdivision of a State*, only if the injury, illness or disability for which health services were provided is covered under (1) workers' compensation laws, or (2) a no-fault automobile accident insurance plan or program." 25 U.S.C. § 1621e(b) (1988) (*enacted* Pub. L. No. 100-713, 102 Stat. 4784 (1988); *amended by* Pub.

L. No. 102-573, § 209(a)(4), 106 Stat. 4551 (1992)) (emphasis added). The health services at issue in this case were covered by neither workers' compensation laws nor no-fault automobile accident plans.

In 1992, Congress eliminated the underlined text exempting political subdivisions. Pub. L. No. 102-573, 106 Stat. 4551 (1992); *see* 25 U.S.C. § 1621e(b) (Supp. 1992). The amendment created a statutory distinction between states and political subdivisions. The Bering Strait School District contends that it is an arm of the State of Alaska and exempt from the cost recovery provisions of 25 U.S.C. § 1621e.

II. THE BERING STRAIT SCHOOL DISTRICT.

The State of Alaska created the Bering Strait School District (BSSD) in 1976. At that time, the legislature delegated to BSSD the authority and responsibility to provide educational services to children in the Bering Strait/Norton Sound region of Alaska's unorganized borough. AS 14.08.021. The BSSD region encompasses more than 50,000 square miles of western coastal Alaska, an area larger than the State of Washington. BSSD operates schools in the remote Eskimo villages of Brevig Mission, Diomede, Elim, Gambell, Golovin, Koyuk, St. Michael, Savoonga, Shaktoolik, Shishmaref, Stebbins, Teller, Unalakleet, Wales, and White Mountain.

The Constitution of the State of Alaska divides the state into boroughs, organized and unorganized. Alaska Const. art. X, § 3. The governing body of an organized borough is the assembly. Alaska Const. art. X, § 4; AS

29.20.050. The area of the state outside organized boroughs constitutes the unorganized borough. AS 29.03.010. The governing body of the unorganized borough is the Alaska legislature, and it exercises the same functions as does the assembly in an organized borough:

> The legislature shall provide for the performance of services it deems necessary or advisable in unorganized boroughs, allowing for maximum local participation and responsibility. It may exercise any power or function in an unorganized borough which the assembly may exercise in an organized borough.

Alaska Const. art. X, § 6.

In the unorganized borough, "the legislature shall provide the state money necessary to maintain and operate" the schools. AS 14.12.020(c).

In 1975, the Alaska legislature authorized the division of the unorganized borough into educational service areas called regional education attendance areas or REAAs. AS 14.08.031 (*enacted* 1975 SLA ch. 124, § 2). The legislation defining the REAAs did not create them as organized municipalities. Instead, the enabling legislation unequivocally states that a " 'regional education attendance area' means a service area within the unorganized borough." AS 14.60.010(7). The Bering Strait School District was created as an REAA.

BSSD provides health insurance to its employees through an essentially self-insured plan. In other words, the state money appropriated to the District directly pays an employee's health care expenses. "BSSD does not provide coverage for (1) services received in a government

hospital unless [the employee is] required to pay for such services; or (2) services to which the patient is entitled without charge, or for which there would be no charge if there was no coverage." App. 15.

BSSD's health insurance plan is provided to its employees free of charge. If an Alaska Native employee of BSSD seeks health services for which he or she is financially responsible, the District pays for those services in accordance with the terms of the plan. The District's health insurance plan provides its Alaska Native employees with maximum flexibility. Whether they seek health services at a private facility or at no cost through an Indian health service provider is solely and completely at their discretion.

III. THE PROCEEDINGS BELOW.

The Plaintiffs initiated their lawsuit against the Bering Strait School District in May 1994 in the United States District Court for the District of Alaska. Jurisdiction was based upon 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1345 (U.S. as Plaintiff), and 28 U.S.C. § 2201 (declaratory judgment). Plaintiffs alleged that 25 U.S.C. § 1621e(a) required the District to reimburse reasonable costs and services provided to Alaska Native employees of the District, even though those services were provided to those employees at no cost.

The district court found that "[t]he legislature provides the money necessary to operate the REAAs[,] . . . that REAAs remain state agents under state control," and that the REAAs have been delegated the constitutionally-mandated central government function of education in

the unorganized borough. App. 30. As such, the district court determined that BSSD was exempt from the cost recovery requirements of § 1621e as an arm of the state. App. 31. The government appealed to the Ninth Circuit.

The Ninth Circuit reversed holding that BSSD "does not qualify as a 'State' under the Act." *United States of America ex rel. Norton Sound Health Corp. v. Bering Strait School District*, 138 F.3d 1281, 1284 (9th Cir. 1998). App. 9.

REASON FOR GRANTING THE WRIT

THE OPINION BELOW IMPROPERLY INFRINGES UPON THE STATE OF ALASKA'S SOVEREIGNTY BY OBLIGATING STATE FUNDS SOLELY BECAUSE THE STATE CHOSE TO PROVIDE CONSTITUTIONALLY MANDATED STATE EDUCATIONAL SERVICES THROUGH STATE CREATED AND FUNDED INSTRUMENTALITIES.

This case involves an improper intrusion into the State of Alaska's sovereign power to provide services to its people residing in the unorganized borough. Alaska Const. art. X, § 6. Through this constitutional mandate, the State provides education to its children living in a large part of the State of Alaska. Education is a power reserved to the States, "where States historically have been sovereign," *United States v. Lopez*, 514 U.S. 549, 564-65 (1995), and "to which States lay claim by right of history and expertise." *Id.* at 583 (Kennedy, J., concurring). The Ninth Circuit has confirmed that if the State of Alaska, through its Department of Education, provides educational services in the unorganized borough, state

funds are protected from the reimbursement requirements of the Indian Health Care Improvement Act.[1]

However, because the State of Alaska has chosen to provide those same educational services through instrumentalities created and funded by the State, state funds are subject to payment under that Act. By penalizing the State of Alaska for its chosen method of providing education to its school aged children, the Ninth Circuit interprets the Act in a manner that improperly intrudes on Alaska's ability to carry out its constitutionally preserved sovereign function.

Congressional interference with the educational decisions of the people of Alaska upsets the constitutional balance of federal and state powers. For this reason, " 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' this balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243 (1985)). In this Court's decision in *Gregory*, the Court reiterated the clear statement rule requiring that Congress make its intention 'clear and manifest' if it intends to preempt the historic powers of the States. *Id.* at 461. "This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." *Id.* More recently, this Court noted its reluctance to extend a federal statute beyond its evident scope when that statute

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[1] The State Department of Education did in fact directly manage the schools in the unorganized borough for over a decade. AS 14.10.150(11) (*repealed* 1966 SLA ch. 98, § 59).

impinges upon the States' traditional powers. *Dep't of Revenue of Oregon v. ACF Industries, Inc.*, 510 U.S. 332, 344 (1994). Thus, when such infringement is implicated, this Court "will construe ambiguous statutory provisions in the least intrusive manner that can reasonably be inferred from the statute." *Evans v. United States*, 504 U.S. 255, 291-92 (1992).

The Ninth Circuit's derogation of American federalism has its roots in the court's erroneous understanding of Alaska's constitutional framework. The Ninth Circuit found that REAAs provide educational services in distinct geographic regions of the unorganized borough, thereby becoming local government units. By overlooking and/or misapprehending Alaska's constitutional mandates regarding education in the unorganized borough, the Ninth Circuit has essentially appropriated state funds in derogation of the state's sovereignty. The appropriation of state funds is also in derogation of the congressional purpose of the Indian Health Care Improvement Act which was to increase cost recovery without burdening state governments. App. 28.

The governing body of the unorganized borough in Alaska is the Alaska legislature. Alaska Const. art. X, § 6. The unorganized borough is not a unit of local government. Alaska Const. art X, § 2. The units of local government in Alaska are in fact miniature government, having legislative, executive, and judicial powers. Alaska Const. art. X, § 2 ("All local government powers shall be vested in boroughs and cities.").

The REAAs were created by the legislature as a service area in the unorganized borough. AS 14.60.010(7).

The Alaska Supreme Court has made clear that the legislature, in creating a service area within the unorganized borough, may *not* grant that service area taxing power. *State of Alaska v. Alex*, 646 P.2d 203, 211 (1982) ("The Alaska Constitution's framers sought to proscribe just such entities when they wrote the constitutional provisions at issue here. The framers of the Alaska Constitution were aware of and were determined to avoid the proliferation of special districts with taxing powers that had occurred in other states.").

REAAs are created by the State in the exercise of its own sovereign power, without the particular solicitation, consent, or concurrence of the people within each REAA's boundaries. *See* AS 29.05.060-.110. REAAs, like state agencies, owe their creation to statutes which confer upon them all the powers they possess, prescribe their duties, and impose the liabilities to which they are subject. *See* AS 14.08.11-.151. Local units of government in Alaska, on the other hand, are more amply endowed with corporate life and functions. They exist under general and special charters conferred by the consent of the people who compose them and are created chiefly for the interest, advantage, and convenience of their inhabitants.

BSSD was established for the more convenient administration of the state's education function and to ensure a large measure of local participation as required by Alaska's Constitution. art. X, § 6; AS 14.08.031. While it is defined by geographic limits, it has no attributes of sovereignty within these limits – it is a constituent part of the state government – a wholly subordinate instrumentality, created and existing with a view to the policy of the state at large and serving as an agency of the state

for the specified purpose of education in the unorganized borough. Thus, while BSSD provides state educational services within geographical boundaries, it is not a unit of local government as it has no legislative or judicial power – such powers rest with the State.

In finding that BSSD is not the "State," the Ninth Circuit applied its decision in *Wash. State Dept. of Transp. v. Natural Gas Co.*, 59 F.3d 793 (9th Cir. 1995). App. 8. In that case, the court found that the Department of Transportation qualified as the "State" for purposes of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607. The court held:

> The organized government of a state includes state administrative departments and agencies. A "state agency" is "[a] department, commission, board, committee, *or body of any form operating as an instrumentality of the state government.*" Ballantine's Law Dictionary 1210 (3d ed. 1969).

59 F.3d at 800 (emphasis added).

However, the Ninth Circuit rejected this rationale as applied to BSSD, quoting to a footnote in the *Washington State Dept. of Transp.* case:

> Some courts have concluded that the definition of "State" does not include . . . municipalities. . . . A municipality, a local government with authority over a limited area, is a different type of government unit than a state-wide agency that is part of the organized government of the state itself. Our discussion is limited to whether the definition of "State" encompasses the latter.

59 F.3d at 800 n.5 (quoted in *Bering Strait Sch. Dist.*, 138 F.3d at 1284, App. 8). In concluding that this exception for local governments precludes a finding that BSSD is the "State," the court held:

> In short, a local government unit, though established under state law, funded by the state, and ultimately under state control, with jurisdiction over only a limited area, is not a "State."

Bering Strait Sch. Dist., 138 F.3d at 1284, App. 8.

While the Ninth Circuit did not do so in *WSDOT*, it has construed the entity status of a governmental unit with limited geographical jurisdiction in the case of *Ngiraingas v. Sanchez*, 858 F.2d 1368 (9th Cir. 1988), *aff'd*, 495 U.S. 182 (1990). *Ngiraingas* stands for the proposition that an entity which is devoid of a constitutional grant of sovereignty and instead, receives its limited powers through statutory delegation by the sovereignty which created it, is merely an instrumentality of that sovereignty. In *Ngiraingas*, the court concluded that the territory of Guam was not amenable to suit under § 1983 because it is an instrumentality of the federal government, much like a federal department or administrative agency. 858 F.2d at 1370. The court noted:

> Guam marches squarely to the beat of the federal drummer; the federal government bestows on Guam its powers and, unlike states, which retain their sovereignty by virtue of the Constitution, Guam's sovereignty is entirely a creation of federal statute.
>
> . . .
>
> As a creature of the federal government, Guam stands in sharp contrast to "bodies politic" as

> that phrase is normally understood. . . . Unlike states, Guam has no sovereign status; it cannot create a system of laws and administration except by leave of Congress and, of course, the Constitution does not accord Guam or any other unincorporated territories independent sovereignty. . . .

Id. at 1370-71 (internal citations omitted).

The distinctions set forth by the *Ngiraingas* court between Guam and the "States" is the same distinction which must be drawn between BSSD and units of local government created by Alaska's Constitution. Utilizing the logic of the *Ngiraingas* court, as reflected in the above quote, it follows that as a creature of the state government, BSSD stands in sharp contrast to units of local government as that phrase is normally understood.

In short, by hinging its interpretation of the term "State" in the Indian Health Care Improvement Act upon BSSD's limited, as opposed to state-wide, delegation of authority by the Alaska Legislature, the Ninth Circuit has impermissibly interfered with and intruded upon the State of Alaska's sovereignty. The result is that state funds appropriated for education will be required, involuntarily, to fund Indian health services.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA EX REL NORTON SOUND HEALTH CORPORATION, *Plaintiffs-Appellants,* v. BERING STRAIT SCHOOL DISTRICT, *Defendant-Appellee.*	No. 96-35827 D.C. No. CV-94-00247 (HRH) OPINION

Appeal from the United States District Court
for the District of Alaska
H. Russell Holland, Chief Judge, Presiding

Argued and Submitted
November 3, 1997 – Seattle, Washington

Filed March 12, 1998

Before: Betty B. Fletcher and Diarmuid F. O'Scannlain, Circuit Judges, and William W Schwarzer,* Senior District Judge.

Opinion by Judge Schwarzer;
Dissent by Judge O'Scannlain

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*Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

Edward Himmelfarb, Washingotn, D.C., for the plaintiff-appellant.

Saul Friedman, Anchorage, Alaska, for the defendant-appellee.

OPINION

SCHWARZER, Senior District Judge:

We must decide whether the Bering Strait School District (the "District"), a local school district created under Alaska law, is a "State" within the meaning of the Indian Health Care Improvement Act, 25 U.S.C. § 1621e (the "Act"), for the purpose of qualifying for the exemption from having to make reimbursement to the federal government for health services provided to Alaska Natives.

I.

This action was brought by the United States under section 206 of the Act, codified at 25 U.S.C. § 1621e(a) (West Supp.1997), for reimbursement of the reasonable expenses incurred by both the United States and Norton Sound Health Corporation in providing free health care to the District's Alaska Native employees. The District moved for summary judgment contending that it is an "arm of the state" and therefore entitled to the exemption under the Act for "any State." A "State" is required to make reimbursement only for certain medical services

not involved here. *See* 25 U.S.C. § 1621e(b) (West Supp.1997). The district court granted the motion and, after the United States dismissed the only other claim pending, entered judgment for the district.[1] We have jurisdiction under 28 U.S.C. § 1291 and reverse.

II.

Congress enacted the Indian Health Care Improvement Act, Pub.L. No. 94-437, 90 Stat. 1400 (1976), having found that "[f]ederal health services to maintain and improve the health of the Indians are consonant with and required by the Federal Government's historical and unique legal relationship with, and resulting responsibility to, the American Indian people." 25 U.S.C. § 1601(a) (West 1983). Congress declared that "it is the policy of this Nation, in fulfillment of its special responsibilities and legal obligation to the American Indian people, to meet the national goal of providing the highest possible health status to Indians and to provide existing Indian health services with all resources necessary to effect that policy." *Id.* § 1602(a) (West Supp.1997). The purpose of the Act was to ensure sufficient resources to provide Indians with proper health care and adequate funding to construct modern hospitals and other health care facilities. However, in adopting the Act, "Congress did not view the federal government as the *exclusive* provider of Indian health care benefits"; it considered

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[1] The parties have stipulated that the first claim dismissed without prejudice will never be pursued in any federal court.

that to be a "shared responsibility" with the states. *McNabb v. Bowen*, 829 F.2d 787, 792 (9th Cir. 1987).

In 1988, recognizing that health care was available to some Indians through employers who provided health insurance plans to their employees, Congress added a section 206 to the Act, giving the United States the right to recover the "reasonable expenses incurred by the Secretary in providing health services" to eligible Indians and Alaska Natives. The United States was authorized to recover from the non-government provider to the same extent that that provider would be eligible for reimbursement from the United States had health care services been provided by the nongovernmental provider and the individual had been required to pay and had in fact paid. Indian Health Care Amendments of 1988, Pub.L. No. 100-713, 102 Stat. 4811 (1988) codified at 25 U.S.C. § 1612e(a).[2] As a result, a health insurer is now required to reimburse the United States for health care provided by the United States to Indians and Alaska Natives who were covered by a health insurance plan, just as the

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[2] Section 1621e(a) provides in relevant part:

> [T]he United States . . . shall have the right to recover the reasonable expenses incurred by the Secretary . . . in providing health services . . . to any individual to the same extent that such individual, or any nongovernmental provider of such services, would be eligible to receive reimbursement . . . if (1) such service had been provided by a nongovernmental provider, and (2) such individual had been required to pay such expenses and did pay such expenses.

25 U.S.C. § 1621e(a).

United States would reimburse non-governmental providers, even though the United States did not itself charge for its services. Congress preempted all provisions of state and local law, and all contract provisions, that would "prevent or hinder" recovery of reimbursement. *See* 25 U.S.C. § 1621e(c). The only exception was that the right of the United States to recover from "any State, or any political subdivision of a State" was limited to treated conditions covered under workers' compensation laws or a no-fault automobile insurance program. 25 U.S.C. § 1621e(b).[3]

Congress later amended section 206 when it adopted the Indian Health Amendments of 1992, Pub.L. No. 102-573, 106 Stat. 4551 (1992). The amendment deleted from 25 U.S.C. § 1621e(b) the words "or any political subdivision of a state." As a result, only an entity qualifying as "any State" enjoys the exemption from liability for reimbursement under the Act. The issue before us is whether the District qualifies as "any State."

III.

The District provides health insurance to its employees, including Alaska Native employees, through an administered self-insurance plan. Alaska Natives,

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[3] Section 1621e(b) provides in relevant part:

> Subsection (a) of this section shall provide a right of recovery against *any State* only if the injury, illness, or disability for which health services were provided is covered under (1) workers' compensation laws, or (2) a no-fault automobile accident insurance program.

25 U.S.C. § 1621e(b) (emphasis added).

however, are also eligible for comprehensive medical care free of charge provided by Norton Sound Health Corporation ("Norton") under the Alaska Tribal Health Compact and Annual Funding Agreement, pursuant to Title III of the Indian Self-Determination and Education Assistance Act, Pub.L. No. 93-638, as added, Pub.L. No. 100-472, 102 Stat. 2296 (1988). The United States brought this action against the District on behalf of Norton for reimbursement of the reasonable expenses incurred by both the United States and Norton in providing free health care to Alaska Native employees of the District.

The District is a Regional Educational Attendance Area ("REAA") located near Nome, Alaska, in the "unorganized borough."[4] By statute an REAA is a school district operated on an area wide basis under the management and control of a regional school board. Its members are elected by qualified voters of the communities served by the REAA. Alaska Stat. § 14.08.041(a) and (b) (Michie 1997). REAAs have the following powers: sue and be sued; contract for services and supplies; establish their own fiscal procedures; hire and compensate employees; adopt regulations governing organization, policies, and procedures for the operation of schools; maintain, operate, discontinue and combine schools subject to approval of the State Department of Education; own land and buildings used in relation to the schools;

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[4] The Constitution of the State of Alaska divides the state into organized boroughs and the "unorganized borough." *See* Alaska Const. art. X, § 3. The "unorganized borough" is the area of the state outside organized boroughs. *See* Alaska Stat. § 29.03.010 (Michie 1997).

and provide rental housing to teachers. Alaska Stat. § 14.08.101. REAAs do not have taxing power. The District receives 82 percent of its income from the state, the balance coming from the federal government and local sources.

In granting summary judgment for the District, the district court looked for guidance to Eleventh Amendment case law while acknowledging, correctly, that the Eleventh Amendment is not at issue. It concluded that because the Alaska legislature oversees and controls REAAs, and provides substantially all of the money necessary to operate them, the District is an "arm of the state" and therefore exempt from the reimbursement requirements of the Act.

The Eleventh Amendment analogy is inapposite. The issue here is one of statutory interpretation: What did Congress intend when it used the phrase "any State" (not defined in the Act) to limit the reimbursement obligation? It is unlikely that it intended the term to be defined in terms of Eleventh Amendment immunity analysis for several reasons: first, the Eleventh Amendment does not apply to suits by the government against states; second, as originally drafted, the exemption also included "political subdivisions" which enjoy no Eleventh Amendment immunity, *see Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 62, 115 S. Ct. 394, 411, 130 L. Ed. 2d 245 (1994); third, the states' exemption from reimbursement liability is only partial; and fourth, there is no evidence that Congress meant to subordinate its claim for reimbursement to protection of the "State's purse." *Id.* at 48, 115 S. Ct. at 404.

The application of the exemption under the Act turns not on whether an entity is an "arm of the State" but whether it is a "State." The plain meaning of the word "State" does not include school district or regional educational attendance area. *See, e.g.*, Webster's Third New International Dictionary 2228 (16th ed.1971) ("one of the bodies politic or component units in a federal system that is more or less independent and sovereign over internal affairs but forms with the other units a sovereign nation (the United States of America) . . . a territorial unit in which the general body of law is separate and distinct from the law of any other territorial unit"). The District relies on our decision in *Wash. State Dept. of Transp. v. Natural Gas Co.*, 59 F.3d 793 (9th Cir. 1995), in which we held that the Washington State Department of Transportation qualified as a "State" under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607. We held that "[t]he organized government of a state includes state administrative departments and agencies . . . [including] '[a] department, commission, board, committee or body of any form operating as an instrumentality of the state government.' " 59 F.3d at 800 (quoting Ballentine's Law Dictionary 1210 (3d ed. 1969)). We expressly distinguished, however, "[a] municipality, a local government with authority over a limited area, [as] . . . a different type of government unit than a state-wide agency that is part of the organized government of the state itself." *Id.* at n.5. In short, a local government unit, though established under state law, funded by the state, and ultimately under state control, with jurisdiction over only a limited area, is not a "State."

Although federal law controls the interpretation of the Act, we note that the Alaska Supreme Court has observed that "[t]he REAA's are not simply successors to the [Alaska State Operated School System]; they are independent entities which have been given broad powers to run their individual school districts as they see fit." *Northwest Arctic Reg'l Educ. Attendance Area v. Alaska Public Serv. Employees, Local 71*, 591 P.2d 1292, 1298 (Alaska 1979), *overruled on other grounds, Alaska Commercial Fishing & Agric. Bank v. O/S Alaska Coast*, 715 P.2d 707, 709 n.5 (Alaska 1986).[5]

We therefore conclude that the School District does not qualify as a "State" under the Act.

The judgment is REVERSED.

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[5] The dissent cites *Alaska v. Chevron Chemical Co.*, 669 F.2d 1299 (9th Cir. 1982), in which we held that Alaska courts would categorize the University of Alaska as a state agency for purposes of permitting the state Attorney General to bring an antitrust action on its behalf. We relied on *University of Alaska v. National Aircraft Leas. Ltd.*, 536 P.2d 121 (Alaska 1975), in which the Alaska Supreme Court drew a distinction between the University and educational institutions created to meet the needs of local areas:

> In its constitutional status it stands as the single governmental entity which was specifically created by the people to meet the statewide need for a public institution of higher education. In this light, the University must be regarded as uniquely an instrumentality of the state itself. Unlike other public educational institutions created to meet the needs of local areas, it exists constitutionally to act for the benefit of the state and public generally.

Id. 124-25.

O'SCANNLAIN, Circuit Judge, dissenting.

I would affirm the judgment of the district court. Our court's decision in *Washington State Department of Transportation v. Washington Natural Gas Co.*, 59 F.3d 793 (9th Cir. 1995), compels the conclusion that the Bering Strait School District ("BSSD") is an instrumentality of the "State" for purposes of the Indian Health Care Improvement Act, 25 U.S.C. § 1601, *et seq.* BSSD is therefore exempt from having to reimburse the federal government for health services provided to its Alaska Native employees. *See* 25 U.S.C. § 1621e(b).

As the majority acknowledges, we held in *Washington Natural Gas* that "[t]he organized government of a state includes state administrative departments and agencies. . . . [including] '[a] department, commission, board, committee, or body of any form operating as an instrumentality of the state government.' " 59 F.3d at 800 (quoting Ballentine's Law Dictionary 1210 (3d ed. 1969)). Therefore, under *Washington Natural Gas*, the relevant question is whether BSSD is a body operating as an instrumentality of the Alaskan government.

The majority's principal justification for its conclusion that BSSD is not an instrumentality of Alaska is that BSSD has "jurisdiction over only a limited area."[1] *See*

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[1] In *Washington Natural Gas*, we stated that "[a] municipality, a local government with authority over a limited area, is a different type of government than a state-wide agency that is part of the organized government of the state itself." *Id.* at 800 n.5. Although it follows from this statement that a

Majority Opinion at 2295. However, our determination as to whether a government entity qualifies as an instrumentality of either a state or the federal government should not turn solely on the geographical dimension over which the government entity exercises jurisdiction. Is the Ninth Circuit not an instrumentality of the federal government, notwithstanding the fact that it comprises only 9 of the 50 states?

Instead of focusing on geography, our inquiry as to whether a government entity qualifies as a state agency should focus, as *Washington Natural Gas* suggests, on *the amount of control* the state wields over that entity. Alaska exercises a high degree of control over BSSD, which is located in its only unorganized borough. The Alaskan Constitution provides:

> The legislature shall provide for the performance of services it deems necessary or advisable in unorganized boroughs, allowing for maximum local participation and responsibility. It may exercise any power or function in an unorganized borough which the assembly may exercise in an organized borough.

Alaska Const. art. X, § 6.

In Alaska's organized boroughs, the borough assembly provides the money necessary to operate the school districts. *See* AS 14.12.020(c). However, in the unorganized borough, the state legislature is required to "provide the state money necessary to maintain and operate"

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municipality is not a state agency, it assuredly does not follow that *all* government entities "with authority over a limited area" are not state agencies. *Id.*

the schools. *Id.* Furthermore, because BSSD is not an organized borough or a city, it does not have the power to tax. *See* Alaska Const. art. X, § 2 ("The State may delegate taxing powers to organized boroughs and cities only."). BSSD therefore receives 82% of its income from the state.[2] Consequently, Alaska would ultimately shoulder the brunt of any judgment entered against BSSD.

Our decision in *Alaska v. Chevron Chemical Co.*, 669 F.2d 1299 (9th Cir. 1982), supports the view that the BSSD is an instrumentality of the state of Alaska. In *Chevron*, we held that the University of Alaska is "a state department or agency that enjoys co-equal status with the executive branch." *Id.* at 1303 n.6. We reached this conclusion despite the fact that the University of Alaska is a corporate entity, has the power to sue and be sued, "independently fixes the salaries of its employees, controls and manages its own real estate, personal property, and money, has independent discretion to invest any and all funds or property, and may lease or sell federal land grants without the approval of the State legislature or executive."[3] *Id.* at 1303-04 (Wallace, J., dissenting).

In light of these considerations, I believe that Alaska exercises sufficient control over BSSD to compel the conclusion that BSSD is a "state agency" as that term was defined by our court in *Washington Natural Gas.* Consequently, I disagree with the majority's holding that BSSD is not exempt under the Indian Health Care Improvement

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[2] Of the remaining 18%, 13% comes from the federal government, while only 5% comes from local sources.

[3] In contrast to the University of Alaska, the BSSD is not a corporate entity and does not hold title to any real property.

Act from having to reimburse the federal government for health services provided to its Alaska Native employees.

I respectfully dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA and NORTON SOUND HEALTH CORPORATION, Plaintiff,	)	
vs.	)	No.
BERING STRAIT SCHOOL DISTRICT, Defendant.	)	A-94-0247 CV (HRH)

ORDER

(Motion for Partial Summary Judgment)

(Filed Sep. 08, 1995)

Defendant, Bering Strait School District ("BSSD"), has filed a motion seeking partial summary judgment.[1] The motion is opposed by plaintiff, the United States for itself and on behalf of Norton Sound Health Corporation ("Norton Sound").[2] Oral argument has been heard.[3]

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[1] Clerk's Docket No. 16.

[2] Clerk's Docket No. 21.

[3] Clerk's Docket No. 23.

BSSD provides health insurance to its employees through a self-insured plan. BSSD does not provide coverage for (1) services received in a government hospital unless [the employee is] required to pay for such services; or (2) services to which the patient is entitled without charge, or for which there would be no charge if there was no coverage. Defendant's Motion for Partial Summary Judgment at 4, Clerk's Docket No. 16.[4]

BSSD used to participate in a state group insurance plan.[5] BSSD participates in Social Security and provides pension benefits to its employees through the state Public Employees Retirement System ("PERS").

Norton Sound is a tribal organization providing health care services to Alaska Natives in the Bering Strait region. The United States of America operates the Alaska Native Medical Center in Anchorage. Both of these entities provide free health services to Alaska Natives. The government[6] is seeking to recover the value of the services provided to Alaska Natives. The government's first cause of action alleges that some services were not provided free of charge. The parties agree this is a factual dispute to be resolved at trial. The second cause of action

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[4] Defendant did not attach the correct liability exclusions with this motion. The page provided this court dealt with hearing aids, not with a policy exclusion where there was free care provided. *See* Defendant's Motion for Partial Summary Judgment, Exhibit C, Clerk's Docket No. 16.

[5] In its application to join the state health plan, BSSD listed itself as a governmental unit. A later form from the state filled in BSSD in a blank titled "Name of Political Subdivision".

[6] For ease of reference, Norton Sound and the United States will be collectively referred to as "the government".

alleges BSSD is legally obligated to pay for the value of services provided free of charge to Alaska Natives.

BSSD seeks summary judgment on the government's second cause of action. This cause of action is based on 25 U.S.C. § 1621e(a) and (b). Section 1621e(a) states:

> Except as provided in subsection (f) of this section, the United States, an Indian tribe, or a tribal organization shall have the right to recover the reasonable expenses incurred by the Secretary, an Indian tribe, or a tribal organization in providing health services, through the Service, an Indian tribe, or tribal organization, to any individual to the same extent that such individual, or any nongovernmental provider of such services, would be eligible to receive reimbursement or indemnification for such expense if –
>
> (1) such services had been provided by a nongovernmental provider, and
>
> (2) such individual had been required to pay such expenses and did pay such expenses.

25 U.S.C. § 1621e(a). Section 1621e(b) states:

> Subsection (a) of this section shall provide a right of recovery against *any State* only if the injury, illness, or disability for which health services were provided is covered under –
>
> (1) workers' compensation laws, or
>
> (2) a no-fault automobile accident insurance plan or program.

25 U.S.C. § 1621e(b) (emphasis added). These statutes were originally enacted as part of the Indian Health Care Amendments of 1988, Pub. L. No. 100-713, 102 Stat. 4784

("1988 Amendments"). Subsection (b) of 1621e was amended as part of the Indian Health Amendments of 1992, Pub. L. No. 102-573, 106 Stat. 4526 ("1992 Amendments"). Subsection (b) of 1621(e) originally stated, "Subsection (a) of this section shall provide a right of recovery against *any State, or any political subdivision of a State,* only. . . . " 25 U.S.C. § 1621(e)(b) (enacted 1988, amended 1992). The 1992 Amendments eliminated the political subdivision exemption.

BSSD contends it is an arm of the state and is therefore excluded from the reimbursement requirements of section 1621e. The government claims BSSD is a political subdivision and as such is required to reimburse the government.

An explanation of the Alaska School System will help clarify the issues in the instant motion. The Constitution of Alaska requires the legislature to maintain a public school system. Alaska Const. art. VII, § 1. Alaska is divided into organized boroughs and an unorganized borough. *Id.* art. X, § 3.[7] An assembly is the governing body of an organized borough. *Id.* art. X, § 4. The Constitution of Alaska states:

> The legislature shall provide for the performance of services it deems necessary or advisable in unorganized boroughs, allowing for maximum local participation and responsibility. It may exercise any power or function in an

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[7] The Constitution of Alaska speaks of unorganized boroughs, however, by statute all areas of the state not within an organized borough constitute a single unorganized borough. AS 29.03.010. This statute was enacted in 1972.

> unorganized borough which the assembly may exercise in an organized borough.

Id. art. X, § 6. In an organized borough, the borough assembly provides the money necessary to maintain and operate the district. AS 14.12.020(c). The legislature provides the money necessary to operate the unorganized borough. *Id.*[8]

Since statehood, three statutory schemes have been adopted to operate the school system in the unorganized borough. The first scheme was direct management by the Department of Education. The second scheme was the Alaska State-Operated School ("ASOS") system.[9] The third system was the creation of Regional Education Attendance Areas (REAAs).[10]

The ASOS system had the following characteristics: (1) a corporation called "the Alaska State-Operated School System" was created. AS 14.08.020 (repealed 1975); (2) all ASOS schools were exclusively managed by a single board of directors consisting of seven members who were appointed by the governor and confirmed by the legislature. AS 14.08.010, 14.08.030, 14.08.050 (all three repealed 1975); (3) the ASOS corporation could sue or be sued, hold property, and contract in its own name. AS 14.08.020(1)-(3) (repealed 1975); and (4) the legislature

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[8] BSSD gets five percent of its general operating funds from local revenues. Defendant's Motion for Partial Summary Judgment, Exhibit A at 3, Clerk's Docket No. 16. BSSD gets eighty two percent from the state and thirteen percent from the federal government. *Id.*

[9] This system started in 1970.

[10] This system started in 1975.

was required to provide the money necessary for the ASOS. AS 14.12.020(c) (amended 1975).

The REAAs systems have the following characteristics: (1) the legislature delegates to school boards for each of the REAAs the authority to operate the public schools in those areas. AS 14.08.021; (2) regional school boards are elected by the people of the region. AS 14.08.041(b); (3) the state generally has title in the property. AS 14.08.151; and (4) even if the REAAs take title to property they must carry insurance that lists the state as an additional insured. 4 AAC 31.200(a) & (c). As stated previously, the legislature provides funding for the REAAs. AS 14.12.020(c).

The parties disagree on the method of statutory construction this court should use. Defendant claims this court should assume Congress was aware of the meaning of both "political subdivision" and "state" when it chose to eliminate one and not the other from section 1621e(b). The government claims this court should apply a statute specific definition of both "political subdivision" and "state" that would maximize the amount recoverable by the government, which the government argues was Congress' intent.

The Ninth Circuit has stated that "unless Congress has made manifest an intent to the contrary, a presumption obtains that when Congress uses a common law term, it intends to use it in its common law sense." *Citizens Action League v. Kizer*, 887 F.2d 1003, 1006 (9th Cir. 1989).

The government points to *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). In *Goldfarb*, by state law, the

Virginia state bar was an agency of the state. The Supreme Court, however, held it was not immune from a Sherman Act violation under the "state action exemption." *Id.* at 788, 791.[11]

The government also points to *Brock v. Chicago Zoological Soc.*, 820 F.2d 909 (7th Cir. 1987). In *Brock*, the Occupational Safety and Health Administration ("OSHA") levied a fine against the Chicago Zoological Society ("Society"). *Id.* at 910. The Society contended it was a "political subdivision" and therefore exempt under 29 U.S.C. § 652(5). *Id.* OSHA regulations set forth a two part test to determine whether an entity was a political subdivision. *Id.* In applying this test, the Seventh Circuit noted the Society did not treat its employees as public employees. *Id.* at 913. The Seventh Circuit stated:

> [T]he OSH Act's immediate concern is with the employment relationship, at least insofar as the relationship involves considerations of safety and health. The political subdivision exemption represents an accommodation between the Act's general purpose of ensuring a safe workplace and the states' interest in preserving autonomy

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[11] The Supreme Court described the creation of this exemption as follows:

> In *Parker v. Brown*, 317 U.S. 341 (1943), the Court held that an anticompetitive marketing program which "derived its authority and its efficacy from the legislative command of the state" was not a violation of the Sherman Act because the Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government. *Id.*, at 350-352. . . .

Goldfarb v. Virginia State Bar, 421 U.S. at 788.

> in their role as employers. *See Garcia v. San Antonio Metropolitan Transit Authority,* [469 U.S. 528, 553 & n.16 (1985)]; *Crestline Memorial Hospital Assoc. v. NLRB,* 668 F.2d 243, 245 n.1 (6th Cir.1982). Exempting an entity that does not treat its employees as public employees would obstruct the Act's basic purpose without advancing the interests served by the exemption.

Id. at 913. The government claims this court may therefore hold BSSD to be a political subdivision for the limited purpose of section 1621e and may look to the purpose of the statute to assist in this determination. The government contends:

> Congress intended to subject entities like the School District to the recovery provisions of § 1621e, and it is the terms of this federal statute which determines whether the School District is required to pay insurance benefits to the plaintiffs. Section 1621e is concerned with reimbursement by third parties of certain costs of IHS health services, a matter that is necessarily tied to health insurance. Under § 1621e, the states are exempt from coverage. Therefore, the proper focus is whether the United States is seeking reimbursement from a state employee health insurance plan. While the School District does offer its employees health insurance, that insurance is independent and is not part of the State health insurance plan. . . . Therefore, at least *for the health care reimbursement purpose of § 1621e,* the School District is a "political subdivision" and is included within the scope of that section's reimbursement command.

Plaintiffs' memorandum in support of opposition at 2, Clerk's Docket No. 21.

The government argues that the following lead to the conclusion that BSSD is a political subdivision for the purposes of section 1621e: (1) the legislative history of the act; (2) BSSD has been labeled a political subdivision in other contexts; and (3) BSSD is not an arm of the state.[12]

Legislative History

The government cites the following legislative history to the Indian Health Care Amendments of 1988:

> Although eligible for IHS services, some Indian people carry private health care insurance, often as a function of an employment related requirement. In addition, tribal governments often purchase health care insurance policies for all tribal government employees. However, most standard insurance contracts provide for a waiver of the insurance coverage or an exemption from liability under the contract, if care is provided at a Federal facility at no cost to the patient, or if the patient is not primarily financially liable for the services rendered. Thus, while the health care services provided to an Indian patient in a private hospital would be covered by the patient's private insurance, the same services provided to the patient

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[12] At no point does the government say "Even if the Eleventh Amendment test applies BSSD is not an arm of the state." In essence, however, the government argues this. *See* plaintiffs' memorandum at 7-12, 20-22, Clerk's Docket No. 21.

> by the Indian Health Service would not be reimbursed by the insurance company. The effect of such coverage waivers or liability exemptions is that insurers that collect premium payments from IHS-eligible Indian individuals or from tribal governments for coverage of IHS-eligible employees are being paid for insurance coverage which they are not providing. Given the well-documented insufficiency of resources that are available to tribal governments and Indian citizens, expenditures for insurance coverage that provides no benefits to the insured constitute an obvious waste of scarce resources.

S. Rep. No. 508, 100th Cong., 2d Sess. at 15 (1988), *reprinted in* 1988 U.S.C.C.A.N. 6183, 6197. This passage clearly shows Congress was aware of the waiver problem. The government asserts that the proper way to read section 1621e is to maximize the amount recoverable as Congress was concerned with cost recovery. The government's argument is undercut, however, by the next paragraph in the Senate Report, which reads:

> Title II establishes a right of recovery in the United States for the recovery of the reasonable expenses incurred by the Secretary in providing health services through the Indian Health Service to any individual, to the same extent that such an individual or any nongovernmental provider of such services would be eligible to receive reimbursement or indemnification for such expenses, if the services had been provided by a non-governmental provider and the individual had been required to pay the expenses and did pay the expenses. *Title II further provides for a right of recovery against any state, or any political subdivision of a state, only if the injury,*

> *illness, or disability for which health services were provided is covered under workers' compensation laws, or a no-fault automobile accident insurance plan or program.*

Id. at 15-16 (emphasis added). In the paragraph after identifying the problem and in the same paragraph that explains the solution to it, Congress set out the exemption for states and political subdivisions. The mere juxtaposition of the problem and the exemption leads to the conclusion that Congress was well aware of the exemption's potential for interfering with the recovery of costs. For policy reasons that are not made clear, but which have to do with large costs that would have been shifted to the states and political subdivisions,[13] Congress created the exemption. This legislative history does not support the restricted reading of "state" in section 1621e that the government advocates.

The second passage of legislative history the government cites concerns the Indian Health Amendments of 1992. The Senate Report states:

> Tribal health contractors have informed the Committee that certain insurance companies refuse to reimburse the contractors for services provided to Indian and Alaskan Native policyholders. Under the Indian Health Care Improvement Amendments of 1988, there is a right of recovery against private insurers with respect to expenses incurred by the Secretary in providing health services. Congress intended this right to include tribal governments that contract with the government to provide health

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[13] Now repealed as to political subdivisions.

> care as well as the Secretary. . . . The Committee has received reports from several tribal governments and tribal organizations regarding the refusal of some states and political subdivisions of states to pay for health care provided by tribal contractors. The Committee intends this right of recovery to extend to all private insurers, including self-insurance plans developed and maintained by states or political subdivisions of states.

S. Rep. No. 392, 102nd Cong., 2d Sess., at 20-21 (1992), *reprinted in* 1992 U.S.C.C.A.N. 3943, 3962-63. The above passage of legislative history is partially contradicted by the statute as passed. States are still generally exempt under the statute. This passage does not support the restrictive reading of section 1621e the government desires.

State Law use of Political Subdivision

The government contends state law defines BSSD as a political subdivision. The government points to the state health plan, the BSSD's participation in Social Security, and BSSD's participation in the state pension retirement plan.

AS 39.30.090(a) states "[t]he Department of Administration may obtain a policy or policies of group insurance covering state employees . . . or employees of other participating governmental units." Governmental unit is defined as "the state, a municipality, school district, or other political subdivision of the state. . . . " AS 39.30.090(b)(2). There are different plans for state

employees and employees of political subdivisions. Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment, Exhibit 8 at 15-16, Clerk's Docket No. 21. BSSD at one point participated in the health insurance plans for state entities other than the state government. *Id.* at 51-52.[14] BSSD eventually opted out of this plan. *Id.* at 5960. The state government must participate in a group plan. *Id.* at 19. After BSSD withdrew from the plan, the State of Alaska Department of Administration had no "administrative responsibility or control over Bering Strait School District's provision of health insurance to its employees[.]" *Id.* at 24.

The government asserts this shows BSSD is a political subdivision. The only indication BSSD is a political subdivision, however, is from a state form which contains a blank under "Name of Political Subdivision". The original application filed by BSSD, however, listed BSSD as a "governmental unit". Therefore, under AS 39.30.090(a), BSSD is not necessarily defined as a political subdivision.

BSSD participates in Social Security, while the State of Alaska does not. Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment, Exhibit 8 at 11, Clerk's Docket No. 21. AS 39.30.030(a) states "[a] political subdivision of the state may submit for approval by the department a plan for extending the benefits of 42 U.S.C.

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[14] On the Application for Participation form, BSSD referred to itself as a "Governmental Unit". Opposition, Exhibit 8 at 51, Clerk's Docket No. 21. The form used to request inclusion in the health plan had a heading which read "Name of Political Subdivision". Under this heading, BSSD typed in "Bering Strait R.E.A.A. School Distric[t]". *Id.* at 52.

401-433 (Title II, Social Security Act) to its employees." The Alaska statute for social security defines political subdivision as "an instrumentality of the state or of a political subdivision. . . . " AS 39.30.080(6).

The above definition collapses the difference between political subdivision and arm of the state. Under Alaska law, for purposes of Social Security participation, the term political subdivision includes traditional political subdivisions and also includes traditional "arms of the state". This does not clarify BSSD's status.

BSSD provides pension benefits to its employees through the state Public Employees Retirement System ("PERS"). Both political subdivisions and public organizations can participate in this plan. AS 39.35.550-560. Political subdivision is not defined. Public organization is defined as follows:

> "[P]ublic organization" means an organization or entity
>
> (A) created by the constitution or laws of the state for the purpose of administering state programs;
>
> (B) whose officers and employees are paid by a method other than by the state payroll prepared by the Department of Administration; and
>
> (C) whose employees are not required by law to participate in the system[.]

AS 39.35.680(33). In the agreement BSSD signed to participate in the PERS, BSSD is referred to as a "political subdivision". Plaintiffs' Opposition to Defendant's Motion for Partial Summary Judgment, Exhibit 8 at 43-46,

Clerk's Docket No. 21. Janet Parker, the Deputy Director for the Division of Retirement and Benefits, was unable to say anyone made a conscious determination that BSSD was a political subdivision, rather than a public organization. Defendant's reply to plaintiffs' opposition, Exhibit B at 2, Clerk's Docket No. 22. BSSD could as well have been defined as a political organization for purposes of PERS. This court gives little weight to the use of the term "political subdivision" in this context.

This court cannot say that BSSD is a political subdivision by virtue of state law. It is not clear that a state court would say that BSSD is a political subdivision. Congress did not define political subdivision. It is clear, however, that Congress amended political subdivisions out of section 1621e(b) as a means of recovering more costs, *while not burdening state governments.* Plaintiffs have a right to recover against BSSD unless it is clear that BSSD is an agent or arm of the state.

Is BSSD an Arm of the State?

Congress clearly could have created a narrow exemption, such as the one advocated by the government. Congress, however, exempted "any State" and this court must therefore determine whether BSSD is an arm of the state.

In order to make this determination, this court will examine Eleventh Amendment caselaw. The Eleventh Amendment is not at issue in the instant action, however, the caselaw in this area provides guidance to this court concerning what is a political subdivision versus what is an arm of the state.

The Ninth Circuit recently discussed the arm of the state doctrine in *Belanger v. Madera Unified School District*, 963 F.2d 248 (9th Cir. 1992). The Circuit stated:

> To determine whether a governmental agency is an arm of the state, the following factors must be examined: [1] whether a money judgment would be satisfied out of state funds, [2] whether the entity performs central government functions, [3] whether the entity may sue or be sued, [4] whether the entity has the power to take property in its own name or only the name of the state, and [5] the corporate status of the entity.

Id. at 250-51. The Circuit further stated "the first factor is predominate". *Id.* at 251.[15]

In *Belanger*, a principal was removed from her position and reassigned as a teacher. *Id.* at 249. The former principal alleged she was removed due to her gender and brought a 42 U.S.C. § 1983 action. *Id.* at 249-50. Seventy-five percent of the school funds came from the state. *Id.* at 252. The school district could sue or be sued. *Id.* at 254. The school district could own property. *Id.*

The Circuit applied the above five-part test. The Circuit noted "a judgment against the school district would be satisfied from state funds." *Id.* at 252. As to the second factor, the Circuit disregarded a California law which

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[15] These factors are similar to the factors from *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 273 (1977). In *Mt. Healthy*, a school district which had the power to issue bonds and raise taxes was held to be a political subdivision. *Id.* at 280.

gave the school districts "wide discretion and considerable autonomy" and held "[t]hat the state itself has decided to give its local agents more autonomy does not change the fact that the school districts remain state agents under state control." *Id.* at 253. As to the third factor, the Circuit noted that school districts could sue and be sued, but held this factor is "entitled to less weight". *Id.* at 254. As to the fourth factor, the Circuit explained that although the school district could hold property in its own name, the beneficial ownership of the property was with the state, and therefore this factor "is entitled to little weight". *Id.* As to the last factor, the Circuit held that school districts have the corporate status of agents of the state for the purposes of school administration. *Id.*

In this action, BSSD receives 82% of its general operating income from the state. The REAAs have no power to tax to raise revenue. The legislature provides the money necessary to operate the REAAs. AS 14.12.020(c).

In this action, as in *Belanger,* the state itself has allowed the REAAs some discretion and regional autonomy. This does not change the fact that REAAs remain state agents under state control.

BSSD, like the school district in *Belanger,* may sue and be sued. This factor is entitled to less weight than the first two factors.

BSSD, like the school district in *Belanger,* may own property. The insurance policy requirement shows the beneficial use of the property is still in the state. This factor is therefore also entitled to little weight.

The last factor is the corporate status of the entity. Under the ASOS system this status was clear. The corporate status of the ASOS system was in a statute. AS 14.08.020 (repealed 1975). REAAs are not corporate entities due to the repeal of AS 14.08.020. The Constitution of Alaska requires the legislature to oversee the schools in the unorganized borough; and it currently does so.

BSSD is an arm of the state and is therefore exempt from the section 1621e requirements. BSSD's motion for partial summary judgment is granted.

DATED at Anchorage, Alaska, this 7th day of September, 1995.

/s/ H. Russel Holland
United States
District Judge

A94-0247 – CV (HRH)

S. FRIEDMAN (HEDLAND)
M. CONWAY (DAVIS)
S. LINDQUIST (US-ATTNY)

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA EX REL NORTON SOUND HEALTH CORPORATION, Plaintiffs-Appellees, v. BERING STRAIT SCHOOL DISTRICT Defendant-Appellee	No. 96-35827 D.C. No. CV-94-00247 (HRH) ORDER (Filed May 4, 1998)

Before: FLETCHER and O'SCANNLAIN, Circuit Judges, and SCHWARZER,* Senior District Judge.

The petition for rehearing is DENIED.

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* Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.